

No. 14786

United States
Court of Appeals
for the Ninth Circuit

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILE

AUG 3 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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Hollywood 28, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

ANDREW J. WEISZ,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court, Southern District of
California, Central Division

No. 18089-WM

HALLDORA KRISTIN SIGURDSON,

Plaintiff,

vs.

ALBERT DEL GUERCIO, JOHN DOE and
RICHARD ROE,

Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION

Comes now the plaintiff Halldora Kristin Sigurdson and for cause of action against the defendants, and each of them, complains and alleges:

I.

That she now is and for more than ten (10) years last past has been a resident of the County of Los Angeles, State of California, being in the jurisdiction of the above-described court.

II.

That this Court has jurisdiction of the above-described action for a Declaratory Judgment by virtue of the provisions of the Act of June 14, 1934, as amended, commonly known as the Declaratory Judgments Act (Title 28, United States Code, Section 2201, et seq.).

III.

That the defendant Albert Del Guercio is the duly appointed Officer in Charge of the Los Angeles office of the Immigration and [2*] Naturalization Service of the United States and is under the supervision and direction of the Attorney General of the United States and the Commissioner of Immigration and Naturalization, as well as the District Director for this district, said District Director having headquarters in San Francisco, California; that said defendant Albert Del Guercio, as Officer in charge of the Los Angeles office, is charged with the administration and execution within said area of the above District of the Immigration and Naturalization Service orders and the immigration laws of the United States.

That plaintiff is informed and believes that defendants John Doe and Richard Roe are Acting Officers in Charge of the Los Angeles office of above-described agency with the same rights, duty and responsibility as the Officer in charge, as alleged, and that plaintiff so alleges upon her information and belief.

IV.

That plaintiff does not know the true name or names of the defendants sued herein under the fictitious names of John Doe and Richard Roe and asks leave of this Court to amend showing the true name when same shall be duly ascertained.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

V.

That on or about the 30th day of March, 1953, the then District Director of this area for the above-described service, H. R. Landon, as District Director of the Immigration and Naturalization Service issued or caused to be issued an Order of Deportation directing that the plaintiff be taken into custody and deported from the United States to Canada. Plaintiff is informed and believes and upon said ground avers that said Order of Deportation has never since been cancelled or vacated.

VI.

Plaintiff alleges that all administrative remedies have been exhausted. [3]

VII.

That plaintiff filed a petition for writ of Habeus Corpus in this court on June 24, 1953, and said petition was denied on July 28, 1953. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court on September 7, 1954, and the United States Supreme Court denied writ of certiorari on January 10, 1955.

VIII.

Plaintiff contends that by virtue of said Order of Deportation she is about to be taken into custody for deportation and deprived of her liberty unlawfully, in violation of due process and the Fifth Amendment to the Constitution of the United States, for reasons as hereinafter more fully set forth.

IX.

That on or about the 29th day of December, 1946, plaintiff entered the United States at Blaine, Washington, for permanent residence after full and complete compliance with the appertaining law; that she had been a resident since March, 1944, and permanent residence admission secured thereafter as alleged. That at all times since said December 29, 1946, plaintiff has been, and still is, a lawful permanent resident of the United States.

X.

That plaintiff attended the University of Southern California at Los Angeles from 1944 to 1950, attaining the collegiate degrees of A.B. and A.M. That the degree of A.B. was secured in 1948, A.M. in 1950. That she was a regular student for the bachelor's degree, while the master's degree was secured after obtaining employment as a teacher. That in July, 1949, plaintiff took a two-week vacation trip to Mexico and the last entry at San Ysidro, California, was the basis of the charge upon which the warrant of deportation was based. [4]

XI.

That plaintiff filed her "Preliminary Form for Naturalization and Certificate of Arrival" early in the year 1951 and she has been awaiting processing of same since said date of filing.

XII.

That during October, 1950, in response to a request for information from said service, plaintiff

was asked to report to said office at 1 p.m. on November 2, 1950. That she reported as requested and was interrogated by two investigators who were supposed to but did not record the interview, recording on a Dictaphone machine only what they desired and/or commanded plaintiff to state. That plaintiff is informed and believes and upon said ground alleges that eight Dictaphone belts were required to record as much as the investigators felt inclined.

XIII.

That the said investigators of said service presented alleged transcripts of said interview of November 2, 1950. for signature to plaintiff and she refused to sign same on the grounds that they, and each of them, were inaccurate, incomplete and not made freely and voluntarily.

XIV

That on or about the 11th day of October, 1951, plaintiff was served with a warrant of arrest for deportation upon the grounds that she had been a member of the Communist Party of the United States prior to her entry in 1949; that while she was a student at the university, it was claimed that she was a member of a club which was the campus cell of the communist organization.

XV.

That said warrant, plaintiff is informed and believes and upon said ground alleges, was based upon the illegal and unconstitutional examination of Nov.

2, 1950, and the testimony of two professional witnesses, both of whom are perjurers. [5]

XVI.

That she was granted a "so-called" hearing by the immigration service and the alleged statement of the November 2, 1950, interrogation was admitted into evidence over proper and valid legal objections and proof of its inadmissibility and proof that it was based upon spurious Dictaphone belts; that the hearing officer denied plaintiff the right to have the Dictaphone belts examined by Dictaphone Corporation experts to prove their spuriousness; that the hearing officer denied plaintiff right of reasonable cross-examination of a Government witness whom plaintiff subsequently proved a perjurer by documentary evidence; and, the hearing officer failed, neglected and refused to comply with the law set forth in 8 Code of Federal Regulations appertaining to conduct of deportation hearing.

XVII.

That the habeus corpus proceeding was a denial of due process of law in that the immigration service failed to and refused to file with the Court a full and complete immigration file and the documents required under the Order to Show Cause issued at the time of filing of the petition for writ of habeus corpus.

XVIII.

That the Immigration and Naturalization Service, by and through its then local District Director,

H. R. Landon, has issued an Order of Deportation predicated upon the alleged statement of November 2, 1950, and the testimony of the two "alleged" witnesses and the decision of the hearing officer, all as hereinabove alleged, against the plaintiff on the ground that she had, prior to her re-entry, been a member of the communist party of the United States and by reason of the foregoing there is an actual controversy existing between the parties hereto with respect to the validity of said Order of Deportation and with respect to the enforcement thereof against the plaintiff by the defendants and/or defendant. [6]

XIX.

Plaintiff is informed and believes and upon the basis of said information and belief alleges that unless restrained by the Order of this Honorable Court. the defendant Albert Del Guercio, and/or defendants John Doe and Richard Roe, by and through his/their agents and employees intends to and will take plaintiff into custody under color of said Order of Deportation and will deprive her of her liberty and of the opportunity to earn her livelihood, to her irreparable damage, and will continue to act without authorization in law and threatens to and will deprive plaintiff of her liberty without recourse.

XX.

Plaintiff seeks (1) a Declaratory Judgment that the Order for the deportation of plaintiff issued, as aforesaid, on the 30th day of March, 1953, is

void and without force or effect and, (2) an injunction restraining defendants, or any of them, from proceeding against the plaintiff under said Order, pending the determination of the validity of said order.

Plaintiff is without a plain, speedy or adequate remedy at law to prevent or redress such irreparable damage and injury as will result from her summary removal from the United States.

Whereupon, Plaintiff Prays Judgment as Follows:

1. That the Order of Deportation issued by the immigration service be declared illegal and void and without force or effect;
2. That an order be issued permanently enjoining and restraining defendants, or any of them, from deporting plaintiff;
3. Such other and further relief as is proper.

/s/ JOHN P. TOBIN,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed April 18, 1955. [7]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

To Albert Del Guercio, Officer in Charge of the Los Angeles office of the United States Immigration and Naturalization Service, and John Doe and Richard Roe, Acting Officer/Officers of said office for said agency of the Government:

Upon reading the verified complaint on file herein and good cause appearing therefore,

It Is Hereby Ordered That You be and appear in Courtroom No. 2 of the above-entitled court on the 25th day of April, 1955, at the hour of 10 a.m. to show cause, if any you have, why the plaintiff Halldora Kristin Sigurdson should not receive the relief prayed for in the complaint on file herein, and,

It Is Further Ordered that pending the hearing of said Order to Show Cause the defendants, and each of them, be and is restrained and enjoined from deporting said plaintiff.

Dated: April 18, 1955.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Filed April 18, 1955. [9]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To the Plaintiff Above Named, Halldora Kristin Sigurdson, and to John P. Tobin, Her Attorney:

You and Each of You Will Please Take Notice that the defendant Albert Del Guercio, by and through the undersigned, will bring the following Motion to Dismiss, pursuant to Rule 12(b)(1), (6), and (7), Federal Rules of Civil Procedure, on for hearing before the above-entitled Court, in the Courtroom of the Honorable William M. Byrne, United States District Judge, in the United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, on Monday the 2nd day of May, 1955, at 9:45 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: April 22, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ ANDREW J. WEISZ,
Attorneys for Defendant,
Albert Del Guercio. [11]

Motion to Dismiss

The defendant, Albert Del Guercio, as officer in charge of the Immigration and Naturalization Service, Los Angeles, California, appearing specially for this purpose, moves the Court for dismissal of the within action, pursuant to Rule 12(b)(1), (6), and (7). Federal Rules of Civil Procedure, on the following grounds:

1. This Court lacks jurisdiction over the subject matter of the instant action, and plaintiff has failed to allege statutory authority for the jurisdiction of this Court.

2. The Complaint on file herein fails to state a claim upon which relief can be granted for the reasons that the issues raised by the Complaint are settled by the decision in the case of Sigurdson v. Landon, Civil No. 15648-C, and the Order of Deportation may not be reviewed in these proceedings.

3. The Complaint on file herein, if the above grounds are not well taken, fails to join indispensable parties.

This Motion is based and will be presented upon the Complaint of plaintiff on file herein, these Motion papers and the accompanying Memorandum of Points and Authorities in support thereof, together with all the records and files of this action and the action entitled Sigurdson vs. Landon, Civil No. 15648-C.

Dated: April 22, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ ANDREW J. WEISZ,
Attorneys for Defendant,
Albert Del Guercio. [12]

Memorandum of Points and Authorities in Support
of Motion to Dismiss

The Complaint alleges jurisdiction under the provisions of Sections 2201, et seq., of Title 28, U.S.C. It is clear that the Declaratory Judgment Act does not confer any added jurisdiction upon the Federal Courts, but merely enlarges the "range of remedies available." (*Skelly Oil Company v. Phillips Company*, 339 U. S. 667, 671 (1950).) Thus, the complaint fails to allege jurisdiction in this Court.

If one were to disregard the failure to allege subsidiary jurisdiction upon which the claim for declaratory relief is predicated, it is nevertheless apparent that the pleader does not and cannot state a claim upon which relief can be granted. On its face, it is apparent that the Complaint is an attempt to convert the usual type of case in the form

of habeas corpus or judicial review under the Administrative Procedure Act into a Declaratory Judgment Action. The indispensable prerequisite of declaratory relief is the presence of an "actual controversy." (Section 2201, Title 28, United States Code.) As between the plaintiff and the defendant, Del Guercio, it is clear that there is not an actual controversy. (*Rodriguez v. Landon*, 212 F. 2d 508, 509 (C.A. 9, 1954).)

There is, however, an even more cogent reason why the Complaint fails to state a claim upon which relief can be granted. Whether a Deportation Order is reviewable in habeas corpus proceedings, judicial review proceedings, or both (*Aguilera-Flores v. Landon*, 125 F. Supp. 55), a complete review of the validity of a Deportation Order in one such proceeding would necessarily bar later actions in a different form to accomplish the same purpose. It is a cardinal principle that there must be an end to vexatious litigation, which is embodied in the principle of *res judicata*. [13] An examination of the record in the previous habeas corpus proceeding that came before this Court, bearing Civil No. 15648-C, or of the opinion of the Court of Appeals for the Ninth Circuit in that case, reported at 215 F. (2d) 791, establishes that each of plaintiff's contentions has received official consideration, and has been decided against her. The prior judgment not only establishes conclusively that the Order of Deportation is valid, and that the contentions of petitioner concerning invalidity are

not well taken, but also establishes that there is no actual controversy, and that the Complaint was lodged only for the purposes of delay.

It should be further noted that the prior decision is not *res judicata* only as to officers superior to H. R. Landon, named as a defendant in the prior action. (The defendant, Del Guercio, was named in the prior action.) Legalistically, one might argue that plaintiff is not bound by the prior judgment if she were suing a superior officer. In such an instance, there would be the lack of an indispensable party.

Wherefore, this defendant prays that the Complaint filed in this cause be dismissed, the Temporary Restraining Order be dissolved, and that the relief prayed for in the Complaint be denied.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney;

MAX F. DEUTZ,

Assistant U. S. Attorney,

Chief of Civil Division;

ANDREW J. WEISZ,

Assistant U. S. Attorney;

/s/ ANDREW J. WEISZ,

Attorneys for Defendant,

Albert Del Guercio.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 22, 1955. [14]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I.

This Court has jurisdiction of the above-described matter.

Shaughnessy vs. Pedreiro

No. 374 October Term, 1954, of U. S. Supreme Court. Decision: April 25, 1955.

II.

Allegation of jurisdiction in complaint is sufficient.

Shaughnessy vs. Pedreiro, *supra*

Flores vs. Landon

125 Fed. Supp. 55; #16587 WB this court files.

5 USC 1009 (b); (e)(6).

III.

Temporary Injunction pending final determination proper.

5 USC 1009 (d).

IV.

All necessary parties defendant have been named herein.

Shaughnessy vs. Pedreiro, *supra*. [16]

V.

Alien may test the validity of deportation order

by either complaint for declaratory relief or habeus corpus petition. The ruling on one is not res judicata to the other or subsequent filings of same.

Shaughnessy vs. Pedreiro, *supra*.

Respectfully submitted,

/s/ JOHN P. TOBIN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 2, 1955. [17]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MAY 2, 1955

Present: Hon. Wm M. Byrne, District Judge.

Counsel for Plaintiff: John P. Tobin.

Counsel for Defendant: Andrew J. Weisz,
Assistant U. S. Attorney.

Proceedings: For hearing on motion to dismiss,
and for hearing Order to Show Cause.

It Is Ordered that motion to dismiss is granted.

EDMUND L. SMITH,
Clerk;

By CHARLES A. SEITZ,
Deputy Clerk. [18]

United States District Court, Southern District of
California, Central Division

No. 18089-WB

HALLDORA KRISTIN SIGURDSON,

Plaintiff,

vs.

ALBERT DEL GUERCIO, JOHN DOE and
RICHARD ROE,

Defendants.

ORDER OF DISMISSAL

The above-entitled matter came on regularly for hearing of defendant Del Guercio's Motion to Dismiss, under Rule 12(b)(1), (6), and (7) of the Federal Rules of Civil Procedure, on May 2, 1955, in the above-entitled Court, before the Honorable William M. Byrne, Judge Presiding, plaintiff being represented by her attorney, John P. Tobin, and the defendant Del Guercio being represented by his attorneys Laughlin E. Waters, United States Attorney; Max F. Deutz and Andrew J. Weisz, Assistants United States Attorney, by Andrew J. Weisz; and the Court having considered the Motion to Dismiss and the authorities of the parties, and having heard the argument of counsel; and it appearing that the complaint alleges jurisdiction of the action under the provisions of Section 2201, et seq., of Title 28 U. S. C., and it appearing to the Court that said section does not confer jurisdiction

on the Court, and that the Court does not otherwise have jurisdiction to review the matters alleged to have been passed upon by the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff's complaint on file herein be and the same is hereby dismissed for lack of jurisdiction over the [19] subject matter.

It Is Further Ordered that the Temporary Restraining Order heretofore issued on April 18, 1955, be, and the same is hereby dissolved.

It Is Further Ordered that the defendant, Del Guercio have his costs against the plaintiff.

Dated: This 2nd day of May, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed May 2, 1955.

Judgment docketed and entered May 2, 1955. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73 (B)

Notice is hereby given that Halldora Kristin Sigurdson, plaintiff in the above-described action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

1. The Order of May 2, 1955, dismissing plain-

tiff's complaint for Declaratory Judgment and Injunction;

2. Order of May 2, 1955, discharging the Order to Show Cause; and,

3. The final Order or Judgment made in the above matter.

Dated at Los Angeles this 2nd day of May, 1955.

/s/ JOHN P. TOBIN,

Attorney for Plaintiff-
Appellant.

Affidavit of Mailing attached.

[Endorsed]: Filed May 2, 1955. [21]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 23, inclusive, contain the original

Complaint for Declaratory Judgment and Injunction.

Order to Show Cause & Temporary Restraining Order.

Motion & Notice of Motion to Dismiss, etc.

Points & Authorities in Opposition to defendants Motion to Dismiss.

Order of Dismissal.

Notice of Appeal.

Designation of Contents of Record on Appeal.

which, together with a full, true and correct copy of the Minutes of the Court on May 2, 1955, all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 9th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14786. United States Court of Appeals for the Ninth Circuit. Halldora Kristin Sigurdson, Appellant, vs. Albert Del Guercio, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 10, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

At a Stated Term, to wit: The October Term 1954, of the United States Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday the sixth day of May in the year of our Lord one thousand nine hundred and fifty-five.

No. 14786

HALLDORA KRISTIN SIGURDSON.

Appellant,

vs.

ALBERT DEL GUERCIO, et al.,

Appellees.

ORDER SUBMITTING AND GRANTING
MOTION FOR RESTRAINING ORDER

Ordered motion of appellant for an order restraining the deportation of appellant from the jurisdiction of this Court pending determination of her appeal herein, presented by Mr. John P. Tobin, counsel for appellant, and by Mr. Andrew J. Weisz, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

On consideration thereof, It Is Further Ordered that the deportation of Halldora Kristin Sigurdson be stayed until the further order of this court.

In the United States Court of Appeals
for the Ninth Circuit

No. 14786

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO, JOHN DOE and
RICHARD ROE,

Respondents.

STIPULATION RE: POINTS ON APPEAL
AND PARTIAL CONTENTS OF REPORT-
ER'S TRANSCRIPT

It is hereby stipulated by and between the under-
signed counsel for the above-named and described
parties:

1. That the points on appeal briefly stated are:
 - a. Did the District Court have jurisdiction;
 - b. Did the District Court abuse its discre-
tion in denying appellant right to amend her
complaint.

2. That the reporter's transcript of the proceed-
ings in the District Court of the above matter on
May 2, 1955, would show, if prepared from the said
reporter's notes, that counsel for appellant asked
for permission to amend the complaint herein to
correctly designate statutory jurisdiction of the Dis-
trict Court, and that the trial court denied right to

amend on the ground, amongst others, that the plaintiff, appellant herein, could not properly allege a cause of action giving District Court jurisdiction and this stipulation is made for the purpose of avoiding necessity of preparing a reporter's transcript of the proceedings for that one point.

Dated: June 10, 1955.

/s/ JOHN P. TOBIN,
Attorney for the Plaintiff-
Appellant.

LAUGHLIN E. WATERS,
U. S. Attorney;

MAX F. DEUTZ,
ANDREW J. WEISZ,
Assistants U. S. Attorney;

By /s/ ANDREW J. WEISZ,
Attorneys for Albert Del
Guercio, Appellee.

[Endorsed]: Filed June 13, 1955.

